

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	:	
	:	Docket No. 10-0467
Proposed General Increase in Electric	:	
Rates	:	

**VERIFIED PETITION FOR INTERLOCUTORY REVIEW OF THE
COALITION TO REQUEST EQUITABLE ALLOCATION OF COSTS TOGETHER**

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The Coalition to Request Equitable Allocation of Costs Together (“REACT”), by its attorneys DLA Piper LLP (US) and pursuant to Section 200.520 of the Rules of Practice of the Illinois Commerce Commission (“Commission”), respectfully seeks interlocutory review of the September 17, 2010 Ruling (“September 17 Ruling”) of the Administrative Law Judges (“ALJs”) in the instant proceeding regarding REACT’s Combined Verified Response to Commonwealth Edison Company’s Verified Motion for Leave to File Supplemental Direct Testimony and Verified Motion to Dismiss the Instant Proceeding (“REACT Motion”).¹

This case should be dismissed without prejudice because the initial filing made by Commonwealth Edison Company (“ComEd”) in this case did not comply with the Commission’s April 21, 2010 Order in the Special Investigation Proceeding, ICC Docket No. 08-0532 (“Special Investigation Proceeding”). ComEd should not be allowed to force the Commission and the parties proceed with a truncated and convoluted schedule that results solely from ComEd’s

¹ The members customer members of REACT currently are: A. Finkl & Sons Company; Aux Sable Liquid Products, LP; the City of Chicago; Flint Hills Resources, LP; FutureMark Paper Company (formerly known as the Alsip Paper Condominium Association); the Metropolitan Water Reclamation District of Greater Chicago; PDV Midwest Refining LLC; United Airlines, Inc.; and Wells Manufacturing Company. All of these REACT customer members participated in the 2007 ComEd Rate Case and the 2008 ComEd Special Investigation Proceeding as members of REACT. REACT’s supplier members currently are Commerce Energy, Inc.; Integrys Energy Services, Inc.; and Interstate Gas Supply of Illinois, Inc. The positions stated herein do not necessarily represent the positions of any individual member of REACT. The City of Chicago does not join in this Petition.

unexcused non-compliance. Instead, ComEd should be allowed to file a new rate case, that is initiated with a compliant filing.

The September 17 Ruling criticizes ComEd for its untimely filing of studies and testimony that were required by the Commission's Special Investigation Proceeding Order, but refuses to dismiss the instant proceeding, and instead grants ComEd's Motion to File Supplemental Testimony ("ComEd Motion"). As explained by REACT, and in the joint filings of the Attorney General and Dominion Retail on this issue, the ComEd Motion should have been denied, and ComEd's failure to comply with the Special Investigation Proceeding Order is grounds for dismissal of this proceeding without prejudice. REACT accordingly believes that the September 17 Ruling is in error, and in support of this Petition, REACT states the following:

I.

INTRODUCTION

A. REACT

REACT is an *ad hoc* group, with diverse members, including some of the largest of ComEd's commercial, governmental, and industrial delivery services customers as well as retail energy suppliers that are interested in providing service to residential and small commercial customers. REACT's members are committed to advocating that the Commission ensure accurate, appropriate, and equitable allocation of ComEd's costs – both among its customer classes and between the supply and delivery services components of ComEd's rates. That is, the REACT members collectively **Request Equitable Allocation of Costs Together**.

REACT actively participated in all phases of both the 2007 ComEd Rate Case, ICC Docket No. 07-0566 ("2007 ComEd Rate Case"), and the Special Investigation Proceeding, presenting substantial expert testimony and argument in support of fair, accurate, and equitable

rate design that (1) avoids penalizing the largest customers based upon a fundamentally flawed cost study, particularly with respect to the Primary/Secondary Split issue; and (2) allocates Customer Care Costs in a manner that respects principles of cost causation, encourages the development of retail electric competition for residential customers, and treats all customers fairly.

REACT's over-10 MW commercial, industrial, and municipal customer-members are each substantial employers in the state, and important members of the community in Northern Illinois. Each of these customers represents a part of the economic engine that drives the larger Illinois economy. Rate design issues – particularly focusing on accurate ratemaking that properly accounts for the actual cost of providing service including, among other things, the costs associated with the Primary/Secondary Split -- are of utmost importance to these customers.

Each of the retail energy supplier members of REACT provides retail energy services to residential and small commercial customers in a number of other North American jurisdictions, and each is a potential participant in the residential and small commercial retail electric market in the ComEd service territory. Rate design issues are of critical importance to these suppliers as they request that the Commission ensure a level playing field between retail suppliers and the incumbent supplier, ComEd. As such, fair allocation of Customer Care Costs is important. Inaccurate allocation of those costs clearly gives preference to ComEd by causing the supply-related component of ComEd's bundled product (against which the suppliers compete) to be cross-subsidized by the delivery services or "wires" side of ComEd's business, which charges rates that all customers, including those of alternative suppliers, must pay. Improper allocation of supply-related Customer Care Costs to delivery services rates has a number of negative

consequences, including: charging customers who choose to purchase energy from a RES for costs that should be borne only by customers receiving supply from ComEd; and hampering competition by creating an artificially low, and therefore, distorted, price comparison for ComEd customers who shop for alternative suppliers. In short, ComEd's improper allocation of its Customer Care Costs harms the competitive market, and thus harms all customers.

B. REACT's Position

ComEd disobeyed the mandates in the Commission's Special Investigation Proceeding Order, and should be held accountable. The Special Investigation Order explicitly directed ComEd to include specific information when it filed this Rate Case. ComEd failed to include much of that information with its initial filing. ComEd's Motion sought permission to file the information in an untimely manner. REACT respectfully requests that ComEd's Motion be denied, and that the Commission dismiss the instant proceeding without prejudice, in order for ComEd to correct its filing deficiency.

ComEd's initial filing in this Rate Case contained a sizable hole that made it legally inadequate. As ComEd itself admitted in its initial filing and admitted again in its Motion,² ComEd failed to file substantial information explicitly required by the Commission's Special Investigation Proceeding Order. The reason that the Commission ordered ComEd to provide that information in its initial filing was that ComEd had failed to provide it in the context of the Special Investigation Proceeding. Of course, the Special Investigation Proceeding was preceded by a Commission finding that the evidence that ComEd presented in the 2007 ComEd Rate Case was insufficient. The relief sought in ComEd's Motion did not remedy ComEd's

² (See ComEd Ex. 14.0, Direct Testimony of Ross C. Hemphill, at 7:157-8:162; ComEd Ex. 16.0, Direct Panel Testimony of Lawrence S. Alongi and Robert Garcia, at 33:637-34:645; ComEd Motion at 1-2.)

failure to comply with the Special Investigation Proceeding Order, and instead compounded the problems, prejudiced the parties to the instant proceeding, and increased the likelihood that the Commission will once again be faced with an incomplete record.³

ComEd sought to downplay its failure to comply with the Special Investigation Order in its initial filing in the present case as a minor, routine matter that could be remedied by a simple, four-paragraph Motion asking permission to file supplemental direct testimony more than five weeks after ComEd's initial filing was made. However, a review of the documents accompanying the Motion confirmed that this is *not* a minor, routine matter in the context of a proceeding that has an eleven-month statutory deadline for Commission action. ComEd's Motion was accompanied by four (4) new pieces of testimony (totaling 88 pages) together with 13 additional substantive exhibits (totaling 180 pages), including heavily revised proposed tariff sheets and other highly complex documents and analyses, much of which was specifically designed to undermine the very studies and analysis that the Commission ordered ComEd to complete and file with its original Rate Case filing.

Regardless of its motives in the present case, permitting ComEd to proceed in this manner unnecessarily would establish an inappropriate precedent whereby a public utility seeking to increase its rates could intentionally file required information in a piecemeal fashion over the weeks and months following its initial filing. ComEd's own pre-filed Direct Testimony belied the use of that approach in the present case:

ComEd made every practical effort to file compliant tariffs from the outset
However, after the final order in the [Special Investigation Proceeding] was

³ ComEd apparently assumed in its Motion that its proposed "supplemental" filing, if permitted, would satisfy the Commission's mandates in the 2007 Rate Case and Special Investigation Proceeding. REACT takes no position as to the adequacy of the content of the supplemental filing.

issued, there was insufficient time to change the filing to reflect all of that order's decisions.

(Ex. 14.0, Direct Testimony of Ross C. Hemphill, at 7:157-8:162.)⁴ In other words, ComEd's filing was non-compliant.

Permitting the approach that ComEd has used could lead to confusing the issues, undermining a fair case schedule, and increasing the burdens on the other parties to their prejudice. That is the effect of what ComEd has done here. In the present case, the effects are totally unnecessary and inappropriate, because ComEd itself controlled when to file this Rate Case. Nothing compelled ComEd to file this Rate Case before the necessary information – which ComEd was legally compelled to produce – was ready for presentation by ComEd.

The Commission should not permit ComEd's tactics. ComEd's "supplemental" filing was untimely; it was made in disregard of the Special Investigation Proceeding Order; it was contrary to the Public Utilities Act (the "Act") and normal Commission practice; it was not supported as a proper method of conducting a rate case by any Commission rule or regulation identified by ComEd;⁵ it was prejudicial to REACT, as well as other parties; it would unnecessarily increase the likelihood that the Commission again will have less than a complete record to address important cost allocation issues; and it would not advance any desirable public

⁴ Although ComEd has subsequently filed Revised Direct Testimony, the Revised Direct Testimony does not alter the substance of the language quoted herein. Furthermore, the unrevised Direct Testimony reflects ComEd's initial submission.

⁵ The introductory sentence of ComEd's Motion references "83 Ill. Adm. Code § 285.190" as the basis for the Motion. To REACT's knowledge, no such section of the Illinois Administrative Code exists. REACT assumes that ComEd meant to reference § 200.190 of the Commission's general Rules of Practice, which is simply the section regarding "Motions" in Commission proceedings. ComEd's Motion also makes no reference to 83 Ill. Adm. Code § 286.20(b), which delineates the circumstances under which supplemental testimony might be offered by a public utility in a rate case, and establishes the legal standard applicable to evaluating that request. As discussed herein, ComEd's Motion falls well short of satisfying the requirements of § 286.20(b) to allow for untimely supplemental direct testimony.

policy rationale – indeed, it is directly contrary to the clearly desirable policy that regulated entities comply with the Orders of the regulating agency.

Accordingly, REACT respectfully requests that the Commission reverse the ALJs' September 17, 2010 Ruling, and deny ComEd's Motion and grant REACT's Motion to Dismiss. A denial of ComEd's Motion would mean that ComEd's initial filing in the instant proceeding is – by ComEd's own admission, and as confirmed by the August 2, 2010 Deficiency Letter issued in the instant proceeding – legally inadequate. Accordingly, as requested by REACT's Motion, the instant proceeding should be dismissed without prejudice, permitting ComEd to re-file the matter in a consolidated, complete manner on a future date of its choosing. Indeed, assuming that ComEd's supplemental filing is sufficient to satisfy the terms of the Special Investigation Proceeding Order, ComEd presumably could make such a filing at any time now.

II.

BACKGROUND FACTS

A. The Context of the Instant Proceeding

ComEd initiated this proceeding with a filing that – by ComEd's own admission – lacked information that was specifically and unambiguously required by an unappealed Commission Order entered less than three months before the incomplete new filing. The principal issues missing from ComEd's initial filing were: (1) the manner in which ComEd differentiates between and treats customers taking service at primary and secondary voltages (the "Primary/Secondary Split" issue); and (2) the accurate allocation of Customer Care Costs between the supply function and the delivery services function (the "Customer Care Cost" issue). These issues were **not** new. Both issues were litigated intensely in the 2007 ComEd Rate Case and then again in the Special Investigation Proceeding, culminating in the Special Investigation

Proceeding Order that directed ComEd to provide specific information in its rate case filing.

The procedural history to this Interlocutory Appeal dates back to the 2007 ComEd Rate Case. In that case, in response to arguments made by REACT and others, the Commission made a finding that ComEd had failed to provide sufficient rate design evidence; as a result, the Commission initiated the Special Investigation Proceeding regarding ComEd's rate design. ComEd again failed to provide sufficient evidence regarding its rate design in the Special Investigation Proceeding; as a result, the Commission directed ComEd to include that evidence in its next rate case filing. ComEd admitted that, in defiance of the Commission's Special Investigation Proceeding Order, it failed to include the required evidence in its Rate Case filing. ComEd then filed its Motion seeking special permission to supplement its filing 40 days later, thus limiting the time that parties to this proceeding and the Commission itself will have to evaluate this rate design evidence. REACT, along with the Attorney General and Dominion Retail – with additional support from the Citizens Utility Board and Metra – respectfully requested that the Commission dismiss this proceeding without prejudice, allowing ComEd to make a new, fully compliant filing.

B. The 2007 Rate Case

The Commission's Order in the 2007 ComEd Rate Case raised serious doubts about ComEd's analysis and treatment of both the Primary/Secondary issue and the Customer Care Cost issue. As a whole, the Commission found "substantial deficiencies" in ComEd's Embedded Cost of Service Study. (2007 ComEd Rate Case, ICC Docket No. 07-0566, Sept. 10, 2008 Order at 213.)

With regard to the Primary/Secondary Split issue, the Commission concluded:

ComEd admits that the assignment of primary and secondary distribution costs would likely reduce the total cost allocation to customers in the Extra Large Load, High Voltage, and Railroad delivery classes. Although admitting on cross examination that it did not know how expensive this analysis would be, ComEd, nevertheless argues that the cost of the primary secondary analysis exceeds the benefits because the benefits would flow to a small number of customers. This overlooks our explicit policy objective of assigning costs where they belong. Only customers using the primary system would see lower rates but the assignment of costs and the rates charged to all classes would be effected. Moreover, the secondary costs assigned to these primary customers substantially change the cost of serving this small number of customers.

* * *

Having considered the evidence and arguments of the parties, the Commission finds that the ECOSS is deficient in not separating and properly allocating primary and secondary service costs.

(*Id.* at 206-07) (emphasis added).

With regard to Customer Care Cost issue, the Commission stated:

The Commission believes that some percentage of customer care costs may well be attributable specifically to bundled supply customers. This allocation could substantially reduce costs assigned to distribution customers while increasing bundled supply rates. The Commission believes that it is reasonable to investigate the allocation of customer care costs.

(*Id.* at 207-208.)

The Commission found ComEd's improper treatment of the Primary/Secondary Split issue and the Customer Care Cost issue – as well as several other issues – to be so significant that the Commission, on the same day that it issued its Order in the 2007 ComEd Rate Case, initiated a special investigation proceeding to further address those issues.

C. The Special Investigation Proceeding

The Initiating Order in the Special Investigation Proceeding stated:

To facilitate that investigation, ComEd is directed to provide an updated cost of service study that (1) differentiates between primary and secondary voltage level; (2) analyzes the cost of providing Customer Care to a customer taking supply from an alternative supplier versus the cost of providing Customer Care to a customer taking supply from ComEd **The Commission will utilize these updated studies provided in this record to perform a comparative analysis with the rate structure allowed in our Order in Docket 07-0566. Based on this analysis we will determine what changes, if any, are necessary, to ensure that the rate structure of ComEd, with appropriate consideration of historic rate structures of the company, are in fact just and reasonable.**

(Special Investigation Proceeding, ICC Docket No. 08-0532, September 10, 2008 Initiating Order at 2-3) (emphasis added). The Initiating Order therefore required “updated studies” from which it could “determine what changes, if any, are necessary to ensure that the rate structure of ComEd . . . [is] in fact just and reasonable.” (*Id.*)

The Primary/Secondary Split issue and the Customer Care Cost issue were again hotly litigated in the Special Investigation Proceeding, but, after more than seventeen months of litigation, the presiding Administrative Law Judges concluded that ComEd still had failed to provide necessary information. The Administrative Law Judges strongly criticized ComEd’s failure to provide information and recommended a six-month workshop process to remedy the information gap, after which additional proceedings would be held. (*See* Special Investigation Proceeding, ICC Docket No. 08-0532, February 1, 2010 Proposed Interim Order at 38-40, 67-69.)

On April 21, 2010, the Commission issued the Special Investigation Proceeding Order. That Order, similar to the Order in the 2007 ComEd Rate Case, raised serious questions and expressed material skepticism about the manner in which ComEd dealt with the Primary/Secondary Split and the Customer Care Cost issues. (*See* Special Investigation

Proceeding, ICC Docket No. 08-0532, Apr. 21, 2010 Order at 38-40, 67-69.) Instead of requiring a workshop process, the Commission simply directed ComEd to provide specific information in its next rate case filing. For example, in discussing ComEd's analysis of the Primary/Secondary Split issue, the Special Investigation Proceeding Order stated:

Another related concern voiced by Staff, IIEC, REACT, Metra, and the CTA is that the Company relied solely on engineering judgment for many assumptions about primary and secondary costs and made virtually no physical inspections of facilities to verify the reasonableness of those assumptions. **The record shows that when ComEd's engineering estimates were compared to a very small number of system inspections they were found to be very inaccurate.** While the Company could not be expected to inspect its entire system, some visual analyses would enable ComEd to conform the engineering assumptions that drive its analysis of primary and secondary costs to reality. **We direct ComEd to conform the engineering assumptions that drive its analysis of primary and secondary costs through the implementation of sampling methods for physical inspections to confirm engineering judgments and to provide this supporting documentation in its cost of service testimony in subsequent rate proceedings before this Commission.**

(*Id.* at 38) (emphasis added).

Similarly, in addressing ComEd's approach to evaluating cost of service to customers relating to transformers, the Order stated:

Based upon ComEd's tariffs and the description of the system provided to us, we find that ComEd's current method of allocating transformer costs is not appropriate. When the exiting voltage of the transformer is secondary, the transformer can only serve secondary customers and should be allocated as a secondary system cost.

ComEd estimates approximately 300 customers (other than high voltage) actually receive power at the primary level while all other customers (excluding high voltage customers) receive power at the secondary level and therefore have their power transformed from a primary down to a secondary level. **ComEd argues that making rate adjustments for such a small number of customers is not cost effective. We disagree.**

The approximately 300 customers who do not require transformers to step down their voltage should be identified and should receive a downward rate adjustment reflective of transformation cost savings. The remaining 3.7

million customers requiring transformation down to the secondary level should pay rates that reflect an allocation of transformer costs.

In addition to the 300 primary only customers, other customers, including multifamily residential customers, receive secondary voltage service directly from line transformers fed by primary voltage circuits. ComEd presently considers these customers to be primary service customers. According to our reading of ComEd's tariffs, they should be considered secondary service customers. We find that the rates charged to these customers should reflect their use of transformers and some use of the secondary distribution system. **Staff indicates that these customers can be easily identified without extensive studies because they have a unique set of meters.**

(*Id.* at 38-39) (emphasis added).

Given the continued failure of ComEd to provide analysis that met its standards, the Commission ordered the following:

Consistent with the foregoing, **we direct ComEd to develop and provide in its next rate proceeding:** 1) direct observation or sampling and estimation techniques of ComEd's system to develop more accurate and transparent differentiation of primary and secondary costs; 2) other utilities' methods of differentiating primary and secondary systems and costs; 3) function based definitions of service voltages for facilities other than the line transformers already addressed; 4) an analysis of which customer groups are served by which system service components; and 5) consideration of redefining rate classes on the basis of voltage or equipment usage to better reflect the cost of service.

(*Id.* at 40) (emphasis added).

The ordering paragraphs of that Order reiterated ComEd's obligation, stating:

IT IS FURTHER ORDERED that Commonwealth Edison Company should file an updated ECOSS for consideration **in its next rate filing** as outlined herein.

(*Id.* at 85) (emphasis added).

In discussing the Customer Case Cost issue, the Special Investigation Proceeding Order was similarly direct, stating, for example:

The question here is from whom should the customer care costs identified in the last rate case be recovered. **ComEd's proposal allocates less than one percent of its customer care costs to supply based on an avoided cost analysis. If the Commission's goal is to assign costs to the cost causers, it is difficult to**

imagine that less than 1% of ComEd's customer care costs are caused by supply related matters. ComEd does not explain why an avoided cost study is used for these costs and for every other cost an embedded cost study is done.

(Id. at 67) (emphasis added).

After reviewing the competing views of REACT and ComEd and noting that “REACT does raise many valid points,” the Commission concluded that:

ComEd is directed to file an embedded cost of service study for these costs and to also include the results of its avoided cost study. This will give the Commission the opportunity to review and compare both methodologies and reach a decision based on all the relevant information. If more costs are allocated to supply, then Rider PE or Rate BESH should also be modified.

(Id. at 68-69) (emphasis added).

The Commission again reiterated ComEd's obligation in the ordering paragraphs of the Order, stating:

IT IS FURTHER ORDERED that Commonwealth Edison Company shall file an embedded cost of service study for its customer care costs **in its next rate filing.**

(Id. at 85) (emphasis added).

This language established without any ambiguity the Commission's legal mandate to ComEd. ComEd had an obligation based on the Commission's Special Investigation Proceeding Order to include in any subsequent rate case filing substantive, specific information about the Primary/Secondary Split issue and the Customer Care Costs issue. ComEd failed to include that information in the June 30, 2010 filing that initiated the instant proceeding, in direct contravention of the Commission's Special Investigation Proceeding Order.

D. Initiation of the Present Case

On June 30, 2010, ComEd filed the instant proceeding. The filing, however, lacked much of the key information mandated by the Special Investigation Proceeding Order. In his pre-filed Direct Testimony, ComEd's lead witness, Ross C. Hemphill, Ph.D., stated that ComEd made efforts to file "compliant" tariffs but recognized that ComEd could not do so completely. (*See* ComEd Ex. 14.0 at 7:157-8:160.) When ComEd made its initial filing, ComEd's lead rate design witnesses likewise stated that "ComEd intends to request permission to file supplemental direct testimony to address and incorporate those directives not reflected in this initial filing." (ComEd Ex. 16.0 at 7:155-64; *see also id.* at 33:637-34:645.) In other words, ComEd acknowledged its own failure to comply with the mandate of the Special Investigation Proceeding Order.

On August 9, 2010, ComEd filed a Verified Motion for Leave to File Supplemental Direct Testimony (the "ComEd Motion"). ComEd apparently intended that the testimony and exhibits attached to its Motion would address any non-compliance with the Special Investigation Order. In accordance with the schedule established by the Administrative Law Judges, REACT, along with the Attorney General and Dominion Retail, filed Responses and Motions to Dismiss on August 26, 2010.⁶ On September 9, 2010, ComEd filed a combined Reply in support of the ComEd Motion, and a Response in opposition to the REACT Motion, as well as the Attorney General/Dominion Retail Motion. Simultaneously, the Citizens' Utility Board and Metra filed Responses in support of the REACT and the Attorney General/Dominion Retail. On September 15, 2010, REACT and the Attorney General/Dominion Retail filed Replies in support of their respective Motions to Dismiss.

⁶ The Attorney General and Dominion Retail filed a corrected joint brief on August 27, 2010.

E. The September 17 Ruling

On September 17, 2010, the ALJs issued a Ruling granting ComEd's Motion and denying REACT's Motion, as well as the joint Motion of the Attorney General and Dominion Retail. The ALJs stated that: "we do not condone or appreciate the way the Company has filed the supplemental testimony in this docket," but nevertheless concluded: "it is still early enough in this proceeding that the parties will have adequate time to process this information." (ICC Docket No. 10-0467, September 17 Ruling.) The Ruling did not further address REACT's arguments about prejudice and untimeliness, or specifically address REACT's arguments regarding ComEd's obligation to file the documents required in the Special Investigation Order with its initial filing or ComEd's lack of good cause shown in its Motion.

III.

THE COMMISSION SHOULD DISMISS THE 2010 RATE CASE DUE TO COMMONWEALTH EDISON'S FAILURE TO COMPLY WITH THE SPECIAL INVESTIGATION PROCEEDING ORDER

A. Commonwealth Edison Did Not Comply with the Special Investigation Proceeding Order

There is no doubt that ComEd's initial filing was not compliant. Given the plain language of the Special Investigation Proceeding Order and ComEd's own testimony discussing the Order, it is clear that ComEd itself knew it was supposed to file the required rate design information completely with its initial filing.

As detailed *supra*, the language of the Special Investigation Proceeding Order set forth the Commission's directives:

IT IS FURTHER ORDERED that Commonwealth Edison Company should file an updated ECOSS for consideration **in its next rate filing** as outlined herein.

IT IS FURTHER ORDERED that Commonwealth Edison Company shall file an embedded cost of service study for its customer care costs **in its next rate filing**.

(Special Investigation Proceeding April 21, 2010 Order, ICC Docket No. 08-0532 at 85) (emphasis added). The Commission's directive was clear. ComEd never sought a clarification, never filed an Application for Rehearing, and never filed an appeal.

ComEd itself acknowledged in its pre-filed testimony that its testimony and supporting exhibits were insufficient to meet the mandate of the Special Investigation Proceeding Order. (See ComEd Ex. 14.0, Direct Testimony of Ross Hemphill at 7:157-8:160; ComEd Ex. 16.0, Direct Panel Testimony of Lawrence S. Alongi and Robert Garcia, at 33:637-34:645; ComEd Motion at 1-2.) In other words, ComEd admitted that it made an incomplete filing that was non-compliant. If ComEd actually thought that the Special Investigation Proceeding Order did not require ComEd to address its mandate in its initial filings, and that it could make such a filing at any time it chose to during this Rate Case, ComEd's witnesses surely would not have admitted that the filing was not in compliance. The plain language of the Special Investigation Proceeding Order leaves no doubt that the Commission required ComEd to make a complete filing of the required information with its initial Rate Case filing.

Neither the Special Investigation Proceeding Order nor anything in the Public Utilities Act provides ComEd with an excuse for non-compliance because the parties arguably will have sufficient time to absorb the late-filed information. REACT respectfully submits that the statement in the September 17 Ruling finding that "it is still early enough in the proceeding that the parties will have adequate time to process this information" is not relevant to the determination of whether ComEd made a legally insufficient initial filing in the present case. The Ruling sets up a potentially problematic regime under which a utility--regardless of its intentions--could disadvantage intervenors by filing essential and required information later than required in a case, as long as it is "still early enough." The Commission can prevent that

possibility by requiring ComEd in the present case to comply with the plain language requirements of the Special Investigation Proceeding Order.

B. Commonwealth Edison Was Required to Comply with the Special Investigation Proceeding Order

As detailed extensively above in §§ II.B, II.C, and III.A, the Special Investigation Proceeding Order explicitly required ComEd to draft certain documents and analyses to be filed with its Rate Case petition. ComEd never objected to the Special Investigation Proceeding Order on the grounds that it overstepped the Commission’s statutory authority in any way, shape, or form. ComEd did not file an Application for Rehearing, pursue an appeal, or take any other action that would indicate in any formal – or even informal – way that the Commission’s Special Investigation Proceeding Order was objectionable to ComEd. As a result, ComEd is bound by its results and must comply with its mandate.

Dismissing the instant proceeding is well within the Commission’s authority. The Commission possesses “plenary power” under the Public Utilities Act (“Act”) with respect to supervision of public utilities. (*Abbott Labs, Inc. v. Ill. Commerce Comm’n*, 289 Ill. App. 3d 705, 711, 682 N.E.2d 340, 347 (1st Dist. 1997) (affirming the Commission’s broad authority to impose a non-cost-based unauthorized use penalty upon natural gas transportation customers in the context of a rate case, even absent an explicit statutory basis).) In exercising that plenary power, the Commission possesses “wide discretion to determine what the public interest requires and what measures are necessary for the protection of those interests.” (*Peoples Gas Light and Coke Co. v. Ill. Commerce Comm’n*, 165 Ill. App. 3d 325, 246, 520 N.E.2d 46 (1st Dist. 1987).) The Act also explicitly provides the Commission with authority to adopt “rules and regulations” to conduct its hearings and investigation, including specifically with respect to “ratemaking cases.” (200 ILCS 5/10-101). If the Commission’s plenary power means anything, it must

mean, at a minimum, that the Commission possesses the basic authority to control its own docket in a reasoned and deliberative manner to ensure that proceedings before it are initiated and conducted in an orderly fashion that complies with its Orders and – as the Commission’s Rules of Practice require – “negate[s] any disadvantage or prejudice experienced by other parties.” (83 Ill. Admin. Code § 200.25(b).)

Of course, the Special Investigation Proceeding Order was not the first time that the Commission ordered ComEd to provide analyses with its initial filings in subsequent rate case filings. For instance, in ComEd’s 2005 Rate Case, the Commission stated in its Order:

The suggestion in BOMA’s reply brief, however, that in its next rate case ComEd should be required to explain in testimony the basis for the weighting factors utilized in its cost of service study is reasonable. This recommendation is adopted and ComEd is directed to provide such direct testimony at the time it files its next rate case.

(2005 Rate Case, ICC Docket No. 05-0597, July 26, 2006 Order, at 167.) Although the case was reheard subsequent to this Order, neither this issue nor the Commission’s power to impose requirements on ComEd’s next rate filing were disputed. (*See Verified Application for Rehearing of Commonwealth Edison Company*, ICC Docket No. 05-0597, filed Aug. 15, 2006.)

A party dissatisfied with a Commission Order may pursue only the remedies provided by the Act, set forth in Section 201(f) of Article X:

When no appeal is taken from a rule, regulation, order or decision of the Commission, as herein provided, parties affected by such rule, regulation, order or decision, shall be deemed to have waived the right to have the merits of the controversy reviewed by a court and there shall be no trial of the merits of the merits of any controversy in which such rule, regulation, order or decision was made, by any court to which application may be made for the enforcement of the same, or in any other judicial proceedings.

(220 ILCS 5/10-201(f).) Once the Commission decides an issue, the issue should not be revisited without some basis in law or changed conditions. (*See, e.g., City of Chicago v. Commonwealth Edison*, 1997 Ill. PUC LEXIS 259 at *29-30 (Ill. Comm. Comm’n 1997).)

ComEd did not avail itself of the procedures in Section 201(f) of the Act, and does not allege that there has been any change in law or circumstances; as a result, ComEd is statutorily bound to abide by the outcome of the Special Investigation Proceeding.

C. Commonwealth Edison Did Not Establish the Requisite Good Cause in Its Motion

Notwithstanding any requirements identified in § III.B above that ComEd could not redress by providing Supplemental Testimony, ComEd did not meet the standard for introducing Supplemental Testimony. 83 Ill. Admin. Code § 286.20(b) establishes the standard for submission of supplemental direct testimony by a public utility:

- b) Supplemental direct testimony. Submission of direct testimony shall not preclude submission of supplemental direct testimony with good cause shown. In determining whether good cause has been shown, the Commission shall consider, among other things, the degree to which the information that is the subject of the supplemental direct testimony was not known to the utility at the time direct testimony was filed, and the degree to which facts have changed due to circumstances beyond the control of the utility.

(83 Ill. Admin. Code § 286.20(b).)

“Good cause” means “a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.” (BLACK’S LAW DICTIONARY 692 (6th ed. 1990).) The Illinois Supreme Court holds that a party seeking to make a showing of good cause must submit “clear, objective reasons why it was unable to meet the original deadline and why an extension of time should be granted.” (*Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 348 (2007).)

ComEd’s Motion made no attempt to meaningfully describe any “good cause” for its delinquent proposed testimony, and provided no clear, objective explanation for ComEd’s failure to meet the minimum requirements of the Commission’s Special Investigation Proceeding Order. ComEd’s Motion said only:

[A]fter the [April 21, 2010] final order in the Rate Design Investigation, there was insufficient time to reflect all of that order's directions in the June 30 filing.

(ComEd Motion at 1.)

This statement falls far short of a showing of good cause under § 286.20(b) for at least two reasons. First, ComEd's statement implicitly assumed that ComEd was required to file its Rate Case by June 30, 2010. Yet, ComEd neither cited a legal mandate, nor provided **any explanation** for that filing date. ComEd failed to identify any Commission requirement for a June 30, 2010 filing, and there is nothing in the Act or the Commission's regulations that required ComEd to file its Rate Case on June 30, 2010 or on any other particular date. That filing date was dictated completely by ComEd and the decision to move forward with a non-compliant filing rested solely with ComEd.⁷

Second, even if there were some requirement for a June 30, 2010 filing – which there was not – ComEd's Motion tried to create the impression that ComEd was somehow precluded from providing the required information on the Primary/Secondary Issue and the Customer Care Cost issue in a timely fashion because the Commission's directives in the Special Investigation Proceeding Order were somehow new or a surprise. However, as discussed above, the Primary/Secondary Split issue and the Customer Care Cost issue were hotly litigated between ComEd, REACT, and other parties dating back to the 2007 ComEd Rate Case, which spawned the Special Investigation Proceeding. In other words, the issues have been around for years. Note also that the Special Investigation Proceeding lasted from September 10, 2008 to April 21, 2010 – over a year-and-a-half – and that throughout that proceeding REACT (and other parties)

⁷ In its response to REACT's Motion, ComEd suggested that the Supreme Court's explanation of "good cause" was inapplicable to this proceeding. Yet, ComEd failed to point to any other source of authority from the Supreme Court, the Commission, or any other court or agency to establish an alternative meaning for "good cause."

had been calling for ComEd to undertake the analysis and provide the information that was essentially the same as that called for by the April 21, 2010 Order. At the very minimum, the Proposed Interim Order of February 1, 2010, provided sufficient notice that ComEd would be responsible for these issues in its next rate case filing. (Special Investigation Proceeding, ICC Docket No. 08-0532, Proposed Interim Order, dated Feb. 1, 2010 at 86.)⁸

ComEd's Motion implied that ComEd was blindsided by the requirements of the Special Investigation Proceeding Order, and was starting from point zero in trying to undertake the analysis that that Special Investigation Proceeding Order required. Even in the unlikely event that ComEd was blindsided, that does not excuse ComEd's premature filing of its Rate Case on June 30, 2010, before it fully completed the mandated analysis.

Once again, REACT respectfully submits that the "adequate time" finding in the September 17 Ruling is not relevant to the issue of whether "good cause" was shown. Notably, the September 17, 2010 ruling lacks a finding that ComEd established "good cause." As a result, without regard to the timing within the case, the Supplemental Testimony filing fails to meet the statutory standard.

In short, any suggestion that ComEd lacked the time necessary to comply with the Commission's Special Investigation Proceeding Order **before** filing the instant Rate Case is unpersuasive, not only because it rests on the false assumption that ComEd had to file by

⁸ Specifically, the Proposed Interim Order contained the following Order paragraphs:

"IT IS FURTHER ORDERED that in the event Commonwealth Edison Company files for a rate increase prior to completion of the workshop process, it shall file an embedded cost of service study for its customer care costs.

IT IS FURTHER ORDERED that in the event Commonwealth Edison Company files for a rate increase prior to completion of the workshop process, it shall include the revisions to its ECOSS as required in this Order. "

(Special Investigation Proceeding, ICC Docket No. 08-0532, Proposed Interim Order, dated Feb. 1, 2010 at 86.)

June 30, 2010, but also because it disregards the long history of litigation over the Primary/Secondary Split issue and the Customer Care Cost issue.

IV.

CONCLUSION

ComEd should have complied with the Commission's Special Investigation Proceeding Order. Although the ALJs criticized ComEd's tactics, REACT respectfully submits that the ALJs did not go far enough. REACT respectfully requests that the Commission dismiss the instant case without prejudice and allow ComEd to re-file with a compliant filing.

ComEd admits that it failed to meet the mandatory pre-filing requirements set out in the Special Investigation Proceeding Order. ComEd's attempt to mitigate its non-compliance by filing supplemental testimony 40 days later was inadequate, because it did not meet the requirements in the Special Investigation Proceeding Order. Nevertheless, even to the extent that ComEd's failure to comply would otherwise have been excusable with a 40 day late submission, ComEd's Motion failed to establish good cause, and thus is inadequate under the Public Utility Act's minimum requirements for the Commission to grant permission to any party to file supplemental testimony. Fairness, respect for Commission authority, and respect for the policy of encouraging compliance with legal requirements dictate that dismissal without prejudice is the proper result.

Accordingly, for the reasons stated herein, REACT respectfully requests that the Commission reverse the September 17, 2010 Ruling, deny ComEd's Motion and dismiss the instant proceeding without prejudice.

Respectfully submitted,

**THE COALITION TO REQUEST EQUITABLE
ALLOCATION OF COSTS TOGETHER**

By: /s/ Christopher J. Townsend
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VERIFICATION

STATE OF ILLINOIS)
COUNTY OF COOK) ss:

Christopher J. Townsend, being first duly sworn, deposes and says that he is counsel for The Coalition To Request Equitable Allocation of Costs Together; that he has read the foregoing document; and that the statements contained therein are true, correct and complete to the best of his knowledge, information and belief.

Christopher J. Townsend

Subscribed and sworn to before me
this ____ day of October, 2010.

Notary Public